EXHIBIT A

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

In re: PETER JAMES MEYER and SHAREE LYNN MEYER, Debtors.	No. 10-23914
PETER JAMES MEYER and SHAREE LYNN MEYER, et al., Plaintiffs, vs. U.S. BANK NATIONAL ASSOCIATION, et al., Defendants.	No. 12-01630

TRANSCRIPT OF THE DIGITALLY-RECORDED PROCEEDINGS

BEFORE THE HONORABLE KAREN A. OVERSTREET

SEPTEMBER 28, 2012

Reported by: Robyn Oleson Fiedler
CSR #1931

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DIGITALLY RECORDED IN SEATTLE, WASHINGTON

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THE COURT: I think that takes me back now to Meyer. Is there anyone here on something other than Meyer v. U.S. Bank et al? Okay. And Mr. Jones needs to come back in.

All right. He's here. I think we're up for the Meyers case now.

Okay. Let's have appearances for the record. And I guess we'll start with the moving parties.

MR. ROESCH: Good morning, Your Honor, Benjamin Roesch. I'm here on behalf of US Bank and ASC.

MS. ANDERSON: Heidi Anderson on behalf of defendants ASC and US Bank.

THE COURT: All right.

MS. BUCK: Heidi Buck on behalf of defendant Northwest Trustee Services.

MR. JONES: Richard Jones appearing on behalf of the plaintiffs, Your Honor.

THE COURT: Okay. Mr. Roesch, you're at the podium, so I assume you're going to take the lead with regard to the motion. And I guess what I want to focus

you on is the following. In looking at your motion, I think what it presents for my consideration is the question after my ruling in the Reinke case wherein I said, I was concerned that we don't want to be in a situation where debtors can file complaints that say nothing other than, you know, they weren't the holder. What I said was, you know, debtor has to have some specific factual basis for challenging the standing or the holder status of the foreclosing entity. And that was in the context of after-trial burden-shifting.

But I think what that statement that I made in that case raises for today's purposes is, what does the debtor have to allege in the complaint in order to get past a 12(b)(6) motion?

MR. ROESCH: Well, Your Honor, I think that the answer -- and that statement that you've just referenced goes directly to the Iqbal/Twombly standards.

THE COURT: Right, what's plausible?

MR. ROESCH: Well, there need to be specific facts. And what we have here are a series of allegations that are based upon information and belief. There are no facts to which the Court has pointed.

THE COURT: So do you think it's as simple as if he were to take out the words, "on information and

belief"? Is that the problem?

MR. ROESCH: No, Your Honor. I think that the problem is that there's simply no factual basis for the allegation that US Bank isn't the holder. I think that when we look at what's actually transpired in the servicing of the loan and in the main bankruptcy case, we see exactly the opposite. We have an identification of ASC by plaintiffs as the secured creditor. We have a stipulation with US Bank to lift the stay. We then have negotiations and mediation under the Foreclosure Fairness Act with, again, the servicer. And --

THE COURT: I'm not sure how I look at any of that in the context of a 12(b)(6) motion. I mean, your brief gives almost lip service to that by saying I can look at anything and I can take judicial notice of this or that. But you know, judicial notice is something that I have to take individually as to each pleading. Why not raise those issues on a summary judgment when you actually have them as an evidentiary component of the case? I mean, what's your legal argument that I can just look at all this other stuff when it's not a summary judgment motion?

MR. ROESCH: Well, the law is clear, Your Honor, that you may take into account documents, for example, that are attached to the complaint.

THE COURT: I am taking those into account.

MR. ROESCH: Absolutely. And so what we see in those documents, again, is a consistent identification at all times of ASC as the servicer of -- US Bank's the beneficiary. And so when we bring that back to the complaint, and we need to take a look at whether there are facts alleged in the complaint that would cast any of those documents into doubt, I would submit to Your Honor that the complaint is devoid of anything.

There's no allegation, for example, that anyone other than ASC has served as the servicer on this loan. There's no allegation that anyone other than US Bank has sought to foreclose as the beneficiary under the deed of trust.

And so without any sort of factual basis upon which this speculation is made, I think that the complaint does fail under the 12(b)(6) standard set forth in Iqbal and Twombly.

THE COURT: Well, assuming Mr. Jones was able to identify -- and I think he has -- some irregularities in the documentation, why isn't it enough for him to say, at the time the notice of default was issued, US Bank was not the holder, and Northwest Trustee Service was not acting as its agent?

What more should he have to say? He's subject to Rule 11, so he's got to have a reasonable basis for saying that.

MR. ROESCH: Well, Your Honor, I think we go back to the beneficiary declaration that was attached to the complaint. That was executed by US Bank on June 24 --

THE COURT: It wasn't executed by US Bank at all.

MR. ROESCH: Well, it was executed by, I believe it was Wells Fargo as attorney in fact for US Bank.

THE COURT: When I looked at it, I thought Wells Fargo? How did Wells Fargo enter the picture? I mean, maybe ASC is a subsidiary of Wells Fargo, but that does not make them the same. And once again, the MERS language that you give us to work with, the lenders give us to work with is "nominee," not a word that anybody uses. And so now Bain and I have to debate, is a nominee an agent? Should it be an agent? Does it have to be an agent? Bain said it has to be an agent.

Now here's the new word that the lenders are giving us, attorney in fact. What is that? Who is that? Why does US Bank need Wells Fargo NA to be its

attorney in fact?

MR. ROESCH: Your Honor, part of that can be answered with respect to the caption in this case. And plaintiffs allege that America's Servicing Company is a division of Wells Fargo Bank NA.

So ASC is servicing the loan on behalf of US Bank. And there's been no allegation to the contrary in the complaint.

THE COURT: So now you're going to make an argument that under that new Washington state statute, the servicer can execute the beneficiary declaration.

MR. ROESCH: Well, I think that the Bain court even was clear, Your Honor, that a beneficiary may act through an agent. Here that's precisely what the beneficiary has chosen to do.

THE COURT: So I think this is a form, but wouldn't it have been better than, in the declaration, to say, Wells Fargo NA acts as attorney in fact for the beneficiary and therefore as its agent? And then that would be a statement under oath that Wells Fargo Bank is actually acting in that capacity? Where here we have a party who's not related to the transaction at all, so far as I can tell -- Wells Fargo National Bank, its attorney in fact.

MR. ROESCH: Well, Your Honor, I do think

that the beneficiary declaration states the capacity under which Wells Fargo Bank is acting. And because Wells Fargo Bank is, for legal purposes, ASC here -- ASC is just a division of Wells Fargo -- I don't think that there's any basis calling that into question.

And that, I think, is the standard --

THE COURT: Well, so would I get there by going to the complaint and looking at an allegation in the complaint that ASC is a division of Wells Fargo?

MR. ROESCH: Well, yes, I think so, Your Honor.

THE COURT: Because it's a wholly-owned subsidiary, that doesn't make it a division. Wholly-owned subsidiary is a separate corporation with its own governing body and its own assets and its own separate capacity.

MR. ROESCH: I would submit, Your Honor, the plaintiffs can't get around that by making contradictory allegations in their own complaint. Citing ASC in the caption is one thing, and then making an allegation in the body of their complaint to the contrary.

THE COURT: Well, this may be a stupid question, but if ASC has signed the other -- ASC signed the Foreclosure Loss Mitigation form, right?

MR. ROESCH: Yes, I believe so, Your Honor.

THE COURT: Okay. And therefore, if ASC signed that form, then why wouldn't ASC just sign the beneficiary declaration?

MR. ROESCH: Well, I think -- I don't have -- I certainly can't testify to that answer, Your Honor. I think that, again, we go back to the fact that ASC, as identified in the caption, is not legally distinct from Wells Fargo.

Moreover, US Bank can designate whoever it wants as its attorney in fact. That doesn't necessarily have to be its servicer with respect to the loan. And again, there's been no allegation in the record that Wells Fargo is not US Bank's attorney in fact. So I would submit that the declaration has been properly signed in this case, Your Honor.

Moreover, Your Honor, as I indicated in the reply briefing, the declaration is not only sufficient, it's also accurate. US Bank has possession of the original note endorsement in blank. I don't know that we need a parade, but --

THE COURT: We don't. We don't need to bring it out, because I thought what my opinion in Reinke made clear was what matters with regard to a foreclosure is who is the holder of the note when the

notice of default is issued? So whether you have it in the courtroom today is irrelevant to me. The question is who was -- was US Bank the holder of the note when the Notice of Default was issued to the borrowers?

MR. ROESCH: And my answer would be that the beneficiary declaration was executed several weeks before the Notice of Default was issued to the borrowers and is sufficient to establish that US Bank was the holder.

Moreover, Your Honor, I think we have an argument from the plaintiffs that, separately from being the holder of the note and the beneficiary, US Bank has to prove that it's the owner under subsection 0307(a).

THE COURT: And I'm not sure I agree with that. I know where he gets it, because Bain used the word "owner." But I just -- it seems to me like it's -- maybe you agree with me that it's a misuse of the word. It doesn't really belong in the analysis.

MR. ROESCH: I would agree, Your Honor. And I think we go to the second sentence of that subsection, which just says that the beneficiary will execute a declaration under penalty of perjury stating that it's the actual holder. And that's what we have here before the Court, Your Honor. And there's nothing

in the record, there's nothing in the complaint, that suggests that the relationships set forth in the beneficiary declaration, the relationships between ASC and US Bank as alleged in the complaint and as identified in every one of the documents attached to the complaint, that are related to the nonjudicial foreclosure in this case.

THE COURT: So from a pleading standpoint -- I mean, because let's talk about it from a pleading standpoint. Would it then be the case that what's required is, given this beneficiary declaration, that the plaintiff allege -- not upon information and belief, but allege that Wells Fargo NA is not the agent and/or attorney in fact of US Bank, and therefore, the beneficiary declaration is a nullity.

MR. ROESCH: I think that's exactly right, Your Honor. And I don't think we see that anywhere in the record. I think that issue is dispositive with respect to all of the claims made against ASC and against US Bank, with the possible exception of the RESPA claim, to which there's been no opposition.

THE COURT: Well, and also, the one that has to do with the -- Mr. Jones puts this one routinely in there -- liable, defamation of title.

MR. ROESCH: Right. The slander of title is

not opposed either.

THE COURT: Right. That's different.

MR. ROESCH: Certainly, Your Honor. But again, that very claim goes back to the idea that US Bank was not the beneficiary of the deed of trust. And as the documents and the allegations of the complaint establish, there's no basis to think otherwise. There's certainly been no factual -- specific factual basis alleged, which if true, would prove otherwise.

So under those circumstances, Your Honor, I think that it's -- it is entirely appropriate to dismiss at this stage.

If Your Honor would like, I can address the issues raised by plaintiff with respect to the CPA claims that were discussed in Bain. But again, I think that --

THE COURT: Well, I mean, that claim relies first and foremost on the question of whether US Bank was the holder.

MR. ROESCH: Yes, that's exactly correct, Your Honor.

THE COURT: But the one thing that you didn't mention -- which is mentioned in Bain -- is that you do have an assignment of deed of trust that is executed by MERS as the beneficiary, which is exactly what Bain

says. What Bain says is you might have a presumption -- a presumptively misrepresentative document when MERS represents wrongfully that it is the beneficiary. And unlike the Reinke deed of trust, which didn't have that -- neither deed of trust in the Reinke case had a declaration, had an assignment of deed of trust like this one where MERS represents, "The undersigned beneficiary, MERS, grants, conveys and assigns and transfers to US National Bank as trustee."

So isn't that exactly what Bain said could get you presumptive misrepresentation under the state CPA statute.

MR. ROESCH: Well, I think there's a couple distinguishing factors here, Your Honor. In Bain, MERS itself had appointed the successor trustee. The Bain court said, that's a problem.

THE COURT: Well, MERS was conducting the foreclosure in the Bain case, right? Totally different.

MR. ROESCH: Absolutely.

THE COURT: After that scenario, MERS stopped that.

MR. ROESCH: Right.

THE COURT: So even in my case, in Reinke, MERS was not the foreclosing entity.

MR. ROESCH: Moreover, Your Honor, I think to the extent that the assignment by MERS to US Bank has any effect at all -- and I would suggest to Your Honor that there were two possible scenarios: MERS was acting in its capacity as nominee, as agent for the holder of the note, in which case, no problem; or it was not. Now, there's no indication why that might be, why --

THE COURT: You mean it was not acting as an agent.

MR. ROESCH: Somehow acting on its own rather than, as we had seen in the deed of trust, as nominee for the lender, its assigns and successors. If it's not, if MERS isn't the beneficiary, isn't acting on the beneficiary's behalf, then the assignment of the deed of trust is simply a nullity. But again, we come back to what are we relying on in order to conduct this foreclosure. We're not relying on that assignment. We're relying on the fact that we're the holder, the owner and the beneficiary.

So I think we can set that to the side. More to the point, there's nothing particularly deceptive, I think, or deceptive at all, Your Honor, about the assignment of the beneficial interest in the deed of trust, whether or not the assignment is a nullity, to

the actual beneficiary. It night be a different case, Your Honor, if MERS had signed the beneficial interest in the deed of trust to me, through Ms. Anderson. It didn't. It assigned it to US Bank, who, in fact, is the beneficiary.

And the theme we see running through here is that at all times, the borrowers knew with whom they needed to deal: ASC as the servicer, US Bank as the beneficiary. And that's consistent through all of the documents related to the foreclosure. And in fact, they mediated under that understanding.

THE COURT: Well, the question is we don't know, because when Washington State Supreme Court took up these issues, clearly, the facts weren't there. I mean, whenever you certify questions, you certify the questions not totally in a vacuum, but almost in a vacuum. So you have the court making these statements without really knowing what the underlying fact are. Because now the question in Bain is with regard to the assignment of deed of trust, was the Washington court saying, you actually -- like the Oregon courts have said, you've actually got to have an assignment that goes from the original beneficiary to -- under these circumstances, the original beneficiary to the holder, the new holder of the note.

Or do they buy my analysis in Reinke, which is as long as MERS is doing this as the nominee and agent for the original beneficiary, it works.

MR. ROESCH: Well, Your Honor, I think the answer is in Reinke. And this Court recognized that an assignment of the deed of trust is not necessary prior to a foreclosure. And that's is certainly not what we are relying on in order to conduct the foreclosure. So I think that is one distinguishing factor.

I think there's nothing in the Bain case that suggests that an assignment by MERS somehow nullifies the entire, you know, deed of trust or renders all subsequent proceedings invalid as long as those proceedings are done in compliance with the Deed of Trust Act.

And that's precisely what we see here. There are no allegations, specific allegations, that the notice of default was issued improperly, except that US Bank is not the beneficiary, holder, and owner. And then there's simply no facts to back that up.

And again, I think it would be different if MERS had assigned the deed of trust to someone else, for example, if there were two purported beneficiaries attempting to foreclose. And that's the precise example that the Bain court gave on a situation in

which he might have a CPA claim.

THE COURT: Because the Bain court is concerned that now the borrower doesn't know who the lender is or doesn't know who owns the deed of trust.

MR. ROESCH: That's exactly right, Your Honor. And frankly, we have a clear and consistent record of exactly who that is. And to the extent that the assignment of the deed of trust is relevant at all to the Court's analysis, it merely confirms that US Bank is the beneficiary.

So I think there's no factual basis upon which to speculate otherwise. And that isn't sufficient to get over the plausibility standard and get into a bunch of discovery about whether every single, you know, document related to foreclosure is a fraud, whether the Meyers were mistaken somehow in identifying ASC as the secured creditor here.

There's simply nothing but speculation underlying the complaint, Your Honor. And for that reason, I think we ask that it be dismissed.

THE COURT: Okay. Let me ask, Ms. Buck, you filed a, Me, too, so I'm going to have you make your comments before I ask Mr. Jones to respond.

MS. BUCK: Okay. Good morning. So I just first of all wanted to point out a few factual

distinctions that -- from Reinke. As you know, I'm rather familiar with the Reinke facts.

THE COURT: Yes, you are. As am I.

MS. BUCK: As are you. In that case, as you pointed out, the notice of default was transmitted prior to an assignment of deed of trust being recorded.

THE COURT: Correct.

MS. BUCK: That's not the case here, and that's evident by the allegations in the complaint. It looks like the appointment of a successor trustee in this case was recorded July 1st, 2009, and the notice of default was transmitted dated July 9th, 2010.

THE COURT: The only thing that I noticed that I thought was odd about Northwest Trustee Service, was that Northwest Trustee Service signed -- or at least Mr. Jones alleges that an employee of Northwest Trustee Service signed a document almost a year before it's appointed as the trustee. So on March 10, 2009, paragraph 3.5, an assignment of deed of trust was executed by Jeff Stenman in his purported capacity as vice president for MERS. And that was an entire year before Northwest Trustee arguably was involved in this in any way.

MS. BUCK: First of all, Jeff Stenman signs -- when he signs in his capacity as a vice president of

MERS, he's not doing it in his capacity as an employee of Northwest Trustee Services. He is -- there's a signing authority agreement that appoints him individually, not in his capacity as an employee of Northwest Trustee Services, to sign documents on behalf of MERS.

And as far as the timing goes on this, I would have to review -- you know, it's not in the complaint exactly. I mean, with the intervening bankruptcy and --

THE COURT: Well, the appointment of the successor trustee actually did occur -- I mean, if you just look at the complaint, paragraph 3.8, on March 26th, 2009, an appointment of successor trustee was executed by Anne Neeley, who purports to be the vice president for loan documents -- again, here comes Wells Fargo -- for Wells Fargo Bank acting as attorney in fact for US Bank. So now Northwest Trustee Service is the trustee, if that document is valid. And the notice of default is issued almost an entire year later.

MS. BUCK: Well, I think what occurred between that time was the bankruptcy, which would have solved the nonjudicial foreclosure process from continuing. So I mean, I don't really know -- yes, the appointment of successor trustee happened in March of

2009. Yes, it was done as it was done. But I don't know if that matters.

THE COURT: I don't either.

MS. BUCK: I mean, I don't think that it does. I don't know that -- if I'm clear on what you're asking, I don't think that a lapse of time between an appointment of successor trustee and then a notice of default being issued a year later actually presents any issue.

THE COURT: I don't think it does either.

MS. BUCK: I don't think it does either. Did I answer what you were --

THE COURT: Yes.

MS. BUCK: Okay. I would also just like to point out that, you know, given the fact that time the of successor trustee was recorded appointing Northwest Trustee Services as successor trustee prior to any of its conduct in this case, as far as the nonjudicial foreclosure goes, further supports dismissal of Northwest Trustee Services.

I think it was the Michelson case where Judge Pechman kind of looked at a situation where -- and that was in regard to an original trustee under a deed of trust. But she said that there is no independent duty of a trustee, original or successor trustee, to go and

conduct a secondary investigation into the truthfulness or veracity of documents that it relies on.

So in this example, an appointment of successor trustee that appoints Northwest Trustee Services representing that it's being appointed by US Bank and that it is the beneficiary authorized to appoint Northwest Trustee Services as successor trustee, I think under Washington law, Northwest Trustee Services is entitled to rely on that.

And any allegation that US Bank was not the beneficiary at the time that the appointment of successor trustee is simply is a legal conclusion. There are no facts here that support that legal conclusion. And as you know, that's not something that you would need to take as -- as true in a motion to dismiss.

THE COURT: Is that the same argument that you would make -- I guess it is -- on 12(b)(6), because you would say, as a matter of law -- if, as a matter of law, the trustee can rely on these documents, then the trustee can also rely on the beneficiary declaration that's signed by Wells Fargo Bank.

MS. BUCK: Correct. And as far as just what the facts present from the allegations in the complaint, it's completely consistent. US Bank

appointed Northwest Trustee Services. US Bank was identified as the beneficiary in the notice of default. US Bank was identified as the beneficiary in the notice of sale that was recorded in 2010, in the amended notice of sale that was recorded in 2010, and the second notice of sale following the bankruptcy that was recorded in 2012. There's nothing inconsistent about, you know, who Northwest Trustee Services was conducting a foreclosure on behalf of.

And there's nothing -- there are no allegations that would raise any questions or issues that could legally state a claim that Northwest Trustee should have known or done something to halt the foreclosure based on what they were presented.

THE COURT: All right. Mr. Jones?

MR. JONES: Good morning, Your Honor. The Washington Supreme Court ruled definitively that MERS is an ineligible beneficiary under the Washington Deed of Trust Statute. It wasn't really sure, based upon the status of the litigation that Judge Coughenour threw at them -- I'm sure the Court is painfully aware that most appellate courts hate the situation in which there's no findings of fact that have been adduced, there's no discovery been conducted. Ms. Huelsman, in Bain, had done some discovery, and in the Seilkiwitz

matter, which was mine, no discovery had been done. In fact, no scheduling order had been entered. We were just fresh out of the box.

So the Supreme Court punted on the second question of what the ramifications of that might be.

THE COURT: Right.

MR. JONES: And did go on to say that there are consumer protection claims that could be adduced from the fact that MERS is not an eligible beneficiary.

Primarily, and I'll get to this in a moment -- the Supreme Court said that the first two elements -- I would imagine the first three elements, because I don't think anybody in their right mind is suggesting that MERS is not a business -- that the first two elements would be presumably in play, leaving the issue of injury. And I apologize to this Court, as I did to Judge Dore earlier this morning, that, you know, when it comes to consumer protection claims, the issue of injury versus damage is material, particularly in view of the Bain case.

But the first point we come to is the issue of whether or not MERS is a valid beneficiary or an eligible beneficiary. The Supreme Court has said no. I've heard a lot of talk in support of the motion, basically, a hamster wheel argument, that we start all

this stuff going and we presume certain issues, like, for instance, US Bank is the beneficiary and the holder.

The only evidence we have that US Bank has ever been a beneficiary goes to the assignment of note and deed of trust. It's called an assigment of deed of trust. It is -- and I would like to spend a little time -- Exhibit C to the complaint.

THE COURT: Well, we're not here on summary judgment.

MR. JONES: Oh, I get that.

THE COURT: So I mean, the question is -- and I'm not sure you have alleged clearly in the complaint that at the time the notice of default was issued, US Bank was not the holder.

MR. JONES: I'm going to get to that.

THE COURT: Okay.

MR. JONES: Turning to the assignment, the only basis upon which US Bank can claim that it is a beneficiary, the holder of the note and deed of trust, is through this assignment.

THE COURT: Okay. But at length, in Reinke, I explained that to be the beneficiary in Washington state law only requires that you be the holder of the note. And I think Bain confirms that. It didn't say

anything about the fact that you have to both be the holder of the note and be the assignee of the deed of trust.

MR. JONES: We have no other evidence. And I'm suggesting, Your Honor, that if this document is false -- and I would also say it's fraudulent, it's fraudulent for this reason, that MERS had no authority the true owner to do this act. Presumably, it couldn't be US Bank, because US Bank was the beneficiary of this act. We have nothing to suggest that US Bank was ever involved in this at the outset or -- and certainly the allonge that we have is not dated. The form is a 1999 form that they use.

THE COURT: So what do you think is required? I mean, what we're talking about is what do you have to allege to get past 12(b)(6)? I mean, if we were here on summary judgment, you're absolutely right. I would be looking for their declaration, clearly executed by someone with personal knowledge, that says when the notice of default was issued, US Bank was the holder of the original note and the note was held in such and such a warehouse by so and so.

And the fact of the matter, in thinking about it, that's what MERS is supposed to do, right? MERS is supposed to keep track of where the notes are and who

has them and own them at every single point in time, right? So presumably if I said, Mr. Roesch, give me a declaration that tells me definitively who had that note, who was the holder of that note in 2010 when this notice of default was issued, he should be able to provide me that information from MERS.

But that -- how can that be the issue today when what we're talking about is just have you made out a plausible claim in the complaint.

MR. JONES: I would point out, Your Honor, that throughout the complaint, I allege -- my clients allege that at no time relevant to this cause of action were any of these defendants true and lawful owners and holders of the note or the deed of trust. At all times relevant to this cause of action -- it's throughout the complaint -- these defendants were nothing more than servicers for an undisclosed principal.

These defendant have create amongst themselves -- and I will put Mr. Stenman right up there as an officer of -- and I believe he's an attorney with RCO, but he's certainly an officer of Northwest Trustee. He signs his declaration on behalf of MERS, and frankly, Northwest Trustee is the ultimate beneficiary. By this document -- and you've got to believe that it's true, or at least they believed it to

be true --

THE COURT: The assignment of trust you're talking about?

MR. JONES: Yes, the assignment of deed of trust. They are attempting to assign the note as well. MERS never had the note.

THE COURT: Right. But in Reinke I said that doesn't work. I said very clearly in Reinke that MERS's attempt -- any beneficiary's attempt in an assignment of deed of trust to also transfer the note is invalid. It doesn't work. You have to have an endorsement on the note.

MR. JONES: Agreed. And so I am suggesting that since there's no -- nothing on the note that we have ever seen that suggests that the note was ever assigned prior to this assignment of deed of trust, that in fact, this proceeded any allonge or endorsement. That's the problem. That's why I say --

THE COURT: If you're right, if I were to adopt your analysis, in a complaint a borrower has to do nothing more than allege no specific facts. I mean, as they point out here, everything says US Bank on it. So what's the specific fact? Why do you have the right to have them prove up that they were the original holder of the note at the time the notice of default

was issued?

MR. JONES: I think we addressed that in Jacobson, that there has to be something more than mere servicers running around saying, I've got the note. I've got the note. They wanted to seize my clients of their property based upon documents the Court, I think, would acknowledge, are contradictory.

And frankly, when US Bank -- I have this fact. When Mr. Katz was in FFA mediation and sent me that letter -- which I've attached to my declaration -- he says to me, US Bank is the beneficiary or the servicer, that's somewhat --

THE COURT: Well, I thought what he said was he was representing -- and I would agree with you, that that's a very strange way of presenting yourself -- this firm and the undersigned -- it says, "this law firm represents US National Bank, the beneficiary, or its servicer of the deed of trust." Which is it?

MR. JONES: That's the dilemma. This is the problem throughout this. And here's the real issue before the Court. I understand this Court's concerns. Lord knows, you know, we spent five days last summer dealing with this.

THE COURT: We did.

MR. JONES: And I am more convinced today

that when you get -- when the Washington Supreme Court says that we've got a party here that's ineligible and other people purporting to act on its behalf relying -- they've got to rely upon the assignment of the deed of trust and the concordant assignment of the note, aren't they? Or we just ignore what we find disagreeable. That's what the defendants are asking you to do. Never mind about it. It reminds me of Mr. Kratt's [phonetic] presentation before the Supreme Court. Never mind about this. Never mind about the assignment. We've always had the note.

I disagree with this Court --

THE COURT: So you would say the presence of that kind of assignment of deed of trust by itself satisfies what I said in Reinke, that the borrower's got to have some specific facts that would cause me, under the plausibility standard, to question whether US Bank was in fact the holder at any time.

MR. JONES: When you combine that with the other representations and other miscues along the way. Remember, I'm also making a claim for bad faith under RCW 61.24.010.

THE COURT: By the trustee.

MR. JONES: Yes. Now, Mr. Stenman is arguably an officer and director of Northwest Trustee

Service, signing documents that benefit his firm ultimately in the form of the appointment of the successor trustee.

I will point out that while, in fact --

MS. ANDERSON: Your Honor, can I object?

THE COURT: I don't know.

MS. BUCK: It's actually incorrect. Jeff Stenman signed that assignment of deed of trust in this case. And as Mr. Roesch discussed, it's under -- either way, it's an nullity or it was done in an agency capacity. Mr. Stenman did not sign the appointment of successor trustee in this case.

MR. JONES: Never said he did.

THE COURT: Yeah, I think he's talking about something else.

MS. BUCK: That's what you just said.

MR. JONES: No. I said your firm has benefited from Mr. Stenman's misconduct and fraud.

THE COURT: Okay. Go ahead.

MR. JONES: So what we have here, Your Honor, is a closed circuit in which Northwest Trustee Services purports to assign a note and deed of trust to the servicer, US Bank. Because I think Chuck Katz is right. They're a servicer. And so the servicer then says, Oh, my goodness, we have a default. There's no default.

Only the beneficiary can assert a default, the real owner of the note and deed of trust.

And I do use the word owner, because I do believe that before there can be a trustee's sale, which was already set in this matter, the trustee must have proof that the beneficiary is the owner, RCW 61.24.030. That need not be established at the time the notice of default has been filed, but it is a condition of doing the notice of trustee's sale. And these declarations do not satisfy that. They do not say that they are the owners.

THE COURT: So you think there is a difference between being an owner and a holder. That makes a difference here.

MR. JONES: No, they are one and the same.

THE COURT: Right. So the beneficiary declaration says US Bank is the actual holder of the promissory note or other obligation, evidencing the above-referenced loan, or has requisite authority under RCW 62.3-301 to enforce that obligation.

MR. JONES: That's the UCC. I would say that US Bank is the actual owner and holder or beneficiary. But that definition has been changed. And the problem that we have with this is that we have documents that don't square at this point in time with the Bain

decision.

And, you know, unfortunately, Your Honor, on a 12(b) motion where you have a significant change in law between the time this complaint was filed, I think that the Court should exercise a little bit more caution. And what we're really looking for here, from my client's perspective, is I've got a lot of stuff here that doesn't sit right. It is not consistent. Not consistent with Bain. Not internally consistent with each other.

As the Court points out, we have Wells Fargo Bank as attorney in fact. I've never seen the attorney in fact document. Where's the authority? Did MERS have express authority from the original holder or whoever was holding at that time when Mr. Stenman signed off on it? What sort of documentation --

THE COURT: Okay. But from a pleading perspective, doesn't that mean that you have to include an allegation that Wells Fargo was not the attorney in fact and did not have the authority --

MR. JONES: I did.

THE COURT: -- to sign that.

MR. JONES: I did. Throughout the --

THE COURT: Okay. I'm not seeing that. Because now show me where you think it is. Because you

say something different, slightly different. I mean, in paragraph 3.13, you say very clearly, "At no time relevant to this cause of action was US Bank the true and lawful holder of the subject promissory note."

MR. JONES: I don't know how much --

THE COURT: And at the end of that sentence, you talk about Mr. Kinerty [phonetic] as the purported attorney in fact. And then in 3.14, you talk about all this robo-signing and other cases. And I'm not sure that any of that's really relevant to this case. But I don't think you say, Wells Fargo was not -- had no authority to act for the beneficiary and was not its agent or attorney in fact.

MR. JONES: I believe that allegation is subsumed in what I think may be the relationship between Wells Fargo and ASC. Because I do make the representation that at no time relevant to this cause of action was ASC, as a wholly-owned subsidiary of Wells Fargo Bank, a holder and owner of the promissory note or deed of trust, at any time relevant.

So those would be -- now, if the Court -- and I guess now in view of Bain, if I were to go back through this complaint with what additional information I have, I was to clean up the complaint to tighten up those allegations and bullet points, I probably could.

THE COURT: Well, the real issue is that for the defendants to know that the borrower actually has to have some meat on the bones of the complaint, that the borrower has to take a stand and say, okay, even though it says Wells Fargo as attorney in fact, even though it says -- the notice of default says US Bank, by its agent, Northwest Trustee Service, that you actually have to take a stand and say that wasn't true.

MR. JONES: The difficulty, as the Court is well aware, the banks have all of the information, and the point of it is that MERS has made it very easy for the servicers and the property lenders to hide information. There is no public record any longer.

And so on a 12(b) motion -- let's put it on the other foot. While I understand that there is a burden upon the plaintiff borrower in these circumstances to come forward with facts sufficient to at least raise a concern that there may be some problems with the authority of the defendants who are purporting to foreclose their house, their home, that it is difficult to find the information.

I can tell you, based upon my experience, and as a trustee myself, that this behavior does comport with the behavior we expect in the State of Washington of trustees. After 30 years of doing this stuff, you

know, I've kind of got a sense of how things ought to run and how the statute should be handled, as a lawyer. My clients, on the other hand, have no way. We tried -- and I think this is pertinent -- we asked for a qualified written request to get the very information this Court is seeking, and it has never been responded to, which is another claim that we have.

So I apologize --

THE COURT: But if all they have to do -- I mean, in Reinke and in Bain, we both talk about the importance of furthering the goals of the nonjudicial foreclosure process. So we can have a situation where, you know, a borrower can just come in and file a complaint that doesn't really say anything other than, you know, we don't think US Bank was the holder at any time. Without there being some meant on it, you know, the nonjudicial foreclosure process really becomes useless. Because it's going to involve a judicial determination every time.

MR. JONES: My suspicion is that's probably going to be the case anyway.

THE COURT: Because?

MR. JONES: Because of the Bain decision.

THE COURT: So what you're saying is now what we have is a situation where every nonjudicial

foreclosure that was conducted during this period of time in this certain way is going to raise these issues.

MR. JONES: Oh, I'm just passing a comment that the deed of trust statute provides for both judicial and nonjudicial -- or 61.24 provides for both judicial and nonjudicial means for foreclosing. And it may well be that, should the Washington Attorney General file a class action on behalf of the citizens of the State of Washington against MERS, that that may be something that the legislature will take up and say those transactions that occurred within a certain period of time in which MERS was identified as the beneficiary shall be handled in a way that's different than we're dealing with them now. That, you know, is speculation.

THE COURT: Well, in connection with another case, I saw a TRO signed by a judge in Snohomish County that basically said, I'm issuing the TRO because it is our practice to do so in every case where MERS is involved.

MR. JONES: That is true.

THE COURT: And there was no finding about probable success on the merits. There was no finding of irreparable harm. Just, It's now our practice to

issue these whenever MERS is involved.

MR. JONES: That is true. That'S happening in King County as well.

And the problem is is that, you know, what we're faced with today. I have made allegations in this complaint that none of these defendants were true and lawful holders of the notes and deed of trust, and at no time relevant did they ever obtain the authority as agents to do the actions. And specifically the actions I think are outlined in the statute. Under RCW 61.24, only the beneficiary, the true holder and the owner of the note, can declare a default.

I assert that none of these defendants can allege that there's a default upon which a foreclosure can be based. There's a specific allegation. Two, that none of these defendants can appoint a successor trustee because at no time relevant to this cause of action were they holders and owners of the note and deed of trust. That's another specific statutory act that only the beneficiary can do.

THE COURT: But we saw -- even in Bain, the Court said an agent can do it for the beneficiary. So don't you also have to allege that there was no agent who did it, also?

MR. JONES: That's why I used the language

they did not have the authority. The authority subsumes that it might well be -- and I agree with you -- that in fact, an agency relationship can be utilized.

My problem is that what we're dealing with -- and I think the Court in Bain was very clear -- that agency requires disclosure of the principal. There has to be authority provided from the principal to the agent for the action to be valid. It could well be ratification comes up and that, you know, we have MERS running amuck, and US Bank or whoever might be involved in transactions say, we did not specifically authorize prior to the action, but we ratified the behavior of our agents.

THE COURT: But recall in the Reinke case, when it came to BofA, BofA sent in an employee. A litigation specialist took the stand under oath and said, Northwest Trustee Service was acting as our agent at all times relevant hereto. End of discussion. So the question is do you have to have a clear allegation in the complaint that, you know, Northwest Trustee Service was not acting as US Bank's agent when that notice of default was issued. Wells Fargo was not agenting as the agent of US Bank when this beneficiary declaration was signed.

I mean, we're here on a 12(b)(6) motion. So the question is what do you have to allege to get past that. Because it's not enough to say, US Bank never declared a default if its agent did. Or it's not enough to say, US Bank didn't issue this notice of default if its agent did so validly.

MR. JONES: Well, you're asking some questions I think -- I try not to be too damn clever. I suppose I could put a lot of preparatory language in these, but my practice has been generally -- and probably to my detriment -- to be pretty plain speaking. If I don't have the goods, I don't make the allegation. I can do that, however, if that's what it takes to at least ferret out the truth of the transactions. Because I think that we have a great deal of concealment of, you know, what these parties are doing and on what basis.

But having said that, the difficulty I have now is that this complaint was drafted and filed prior to Bain, and I'm now trying to adjust to that new reality. As this Court is as well.

The fact of the matter is is that I think that the concerns that the Court has, certainly I can say that at the time of the notice of default and the notice of trustee's sales were filed and recorded, that

none of these defendants were acting as true and lawful agents of the owner and holder of the note, that they were -- I could put that in. But it really gets me around to the point that what we really need is some discovery.

And while I understand that we have a fairly Draconian decision from the U.S. Supreme Court with regard to 12(b) motions and the requirements for pleadings --

THE COURT: You mean plausibility?

MR. JONES: No, I'm thinking in terms of the difference between state court causes of action and the standard of review on a 12(b) motion, state court versus federal court, quite a bit different.

But I believe that the complaint that has been provided to this Court, to the best of the information my clients had available, after they tried to get information through a qualified written request, is fair. I can put in additional language that these defendants are not only purporting to act on behalf of entities that they had no authority to act on behalf of, that they are utilizing their MERS stamp to perpetrate a fraud, that they are working for their own self interests between the servicing agent and the trustee in a closed loop without any consideration

given to the real holder of the note and deed of trust -- which, upon reflection, could well be a mortgage-backed security with a bunch of shareholders and another trustee. I don't know.

But if there is sufficient information pled for this Court to find that the complaint is sufficient to raise concerns -- the Court made some of those observations at the outset. And now when you have my declaration, which was not included -- that document was not included in the complaint but certainly is before the Court on this motion -- that where Mr. Katz, who was acting as an attorney on behalf of US Bank is suggesting that they may be something other than the beneficiary, that contradicts what counsel was telling you this morning before me, that they were always the beneficiary. There's been no contradiction whatsoever.

Now, given Bain, I think that if this Court has some specific concerns about the allegations, my clients should have the opportunity to amend its complaint in accordance with federal rules.

Have I answered your questions, Your Honor?

THE COURT: Yes.

MR. JONES: Thank you.

MR. ROESCH: Thank you, Your Honor. Just a few things. First of all, I think that we need to

drill down to the actual facts that were alleged in the case. And I think Your Honor asked a particularly telling question. Upon what fact may the Court infer that US Bank is not the beneficiary on the deed of trust? The answer was that MERS executed an assignment of the deed of trust to US Bank.

Your Honor, I would put forward that that is a circular and self-contradictory answer. The idea that an assignment of a deed of trust, whether valid or annulled to a party, cannot state a claim that that party is not, in fact, the beneficiary.

The same goes for the letter from Chuck Katz. While perhaps it was put slightly in an unwieldly fashion, the fact of the matter is that under FFA mediations, the servicer regularly represents the beneficiary of a loan at the mediation.

Moreover, I don't think we can look at this letter and say, well, that raises some issue about whether the previously-issued notice of default, which clearly identifies the roles of both US Bank and America's Servicing Company -- it says, the beneficiary of the deed of trust is US Bank National Association, as trustee for the structured asset trust -- I don't think that you can take a letter from counsel and say, well -- which does not state anything to the contrary;

it doesn't state that US Bank is not the beneficiary -- and say, well, now there's some question about whether every document, every other document that was sent, that was recorded, and in fact to which they stipulated in the bankruptcy proceeding, is somehow incorrect.

Finally, Your Honor -- well, I think we need to deal, too, with the idea of amending the complaint to make allegations that agency relationships did not exist, for example, that Wells Fargo is not, in fact, US Bank's attorney in fact. Mr. Jones stated that he would happily amend his complaint to do so. But the offer, Your Honor, isn't to allege facts that would lead to that conclusion, but simply -- and this is just like the allegations, that US Bank isn't the beneficiary in the first place -- simply say there's no relationship there, without any evidence to suggest to the contrary.

Recall that the beneficiary declaration itself is signed under penalty of perjury and notifies the Court of that relationship.

THE COURT: Okay. But if what you say is true, I mean, plausibility just goes out the window, doesn't it? I mean, how much do they have to put in the complaint? I mean, we started with a short plain statement of the plaintiff's entitlement to relief.

Now we're at plausibility. And at some point, you know, you're asking for a novel, you know, from the plaintiff. I mean, why should that be the case?

MR. ROESCH: Well, I don't think that is the case, Your Honor.

THE COURT: At what point do you just prove the simple fact of note-holdership on summary judgment?

MR. ROESCH: Well, I think that there are two answers, Your Honor. The first goes to the language of Iqbal, which states that there's facial plausibility when the plaintiff pleads facts that allow the Court to draw a reasonable inference that the defendant is liable for the conduct alleged. A bare allegation that US Bank isn't the beneficiary isn't a fact. It's a conclusion. And the Court's not required to take that as true. The same would be true of a bare allegation that Wells Fargo is not US Bank's attorney in fact.

So then we switch to the second reason. And the reason that the Court imposed that standard is that it recognized that the discovery burden that could be placed on a defendant is substantial.

Now, you know, can we put forward that evidence? Certainly, we can. But in the meantime, plaintiffs will be taking discovery. Certainly, discovery not only related to that issue -- and the

Court recognized that unless there is a reasonable inference that discovery would lead to something, there is no point in burdening the Court, in burdening the defendant with those costs. That's completely consistent with this Court's holding in Reinke and with the purpose of the Deed of Trust Act, which says that you don't have to come in and prove every single fact every time you do a nonjudicial foreclosure. That would interfere with the legislature's purpose of keeping things efficient.

And I think that standard that Iqbal sets out certainly protects the ability of borrowers who have legitimate problems with the nonjudicial foreclosure to challenge the foreclosure. But that doesn't mean that every time there's a nonjudicial foreclosure somebody wants to say, well, they're not the beneficiary. We have to go through this whole process of discovery and, you know, bring someone in to testify or get a declaration. It's an unnecessary burden that interferes with the purpose of the Deed of Trust Act.

Here, Your Honor, we don't have allegations of facts that would support the idea that US Bank does not have authority to foreclose. We have conclusions to that, and I would submit that that is insufficient to support a claim under Rule 12(b)(6).

THE COURT: Okay. Ms. Buck?

MS. BUCK: Let me -- I just have one point I want to touch on. In regard to the allegations that the beneficiary declaration in this case does not satisfy RCW 61.24-0307(a) and that somehow gives -- provides the basis of a claim for breach of duty of good faith by Northwest Trustee Services, plaintiff's argument overlooked the second sentence of 0307(a), which provides that a declaration stating that that entity is the actual holder -- it does not mention ownership -- satisfies the proof requirement of 0307(a) and again is -- Your Honor, read through the beneficiary declaration, we don't need to read it again. On its face, it satisfies that requirement.

I'd also like to point out that under 030, the trustee can rely on one of those declarations unless it's violated its duty of good faith. Here plaintiff's argument seems to be circular. Because the breach of duty of good faith is based on allegations that the beneficiary declaration is invalid or doesn't meet the requirements of the statute. But the only way the breach of duty of good faith -- it's a circular argument. It's going around -- the trustee can rely on the beneficiary declaration unless it has failed to satisfy its duty of good faith.

Here the beneficiary declaration on its face meet the requirements of 0307(a). So it can rely on it. But plaintiff's basis for claiming that the trustee breached its duty of good faith, it's alleging that the beneficiary declaration doesn't meet the requirements of that statute.

THE COURT: I'm not sure I follow you.

MS. BUCK: Well, how can it -- so --

THE COURT: And I'm probably not following you because all your motion said was, me, too. So you didn't file a motion under 12(b)(6) that laid out a motion to dismiss your allegations. And they didn't argue your case for you. All of this that you're talking about is a bit brand new to me, I guess is what I'm saying.

MS. BUCK: Okay. Fair enough. My reading of the motion to dismiss was that it laid out the --

THE COURT: They don't represent the trustee.

MS. BUCK: They don't represent the trustee.

THE COURT: They didn't make a case for you --

MS. BUCK: They didn't make a case for us.

THE COURT: -- as to whether or not I should dismiss the claim against Northwest Trustee Service for breach of good faith.

MS. BUCK: Okay. As far as, you know, I think it is evident from the motion to dismiss that the timing of all these documents. And I would also just finally point out that under the Deed of Trust Act, the trustee must receive this beneficiary declaration only prior to recording a notice of sale.

THE COURT: Not at the time the notice of default is used.

MS. BUCK: Not at the time of the notice of default. Not at the time of appointment of a successor trustee.

So if you follow -- all of the allegations against Northwest Trustee Services are premised on this idea that US Bank didn't have the authority. So if Your Honor, you know, finds that they haven't sufficiently alleged that US Bank did not have the authority, it's my position that all of the allegations or claims that could possibly be made against Northwest Trustee Services also fall away, and we wouldn't even have to get into --

THE COURT: Okay. That's the argument that I assumed you were making from the motion that you filed.

MS. BUCK: That's the argument.

THE COURT: Okay.

Okay. Mr. Jones, you don't get to argue

again, because they start, you respond.

MR. JONES: Oh, Your Honor --

THE COURT: No. I mean, what I'm going to do is I'm going to allow Mr. Jones to amend the complaint. And I really hadn't thought about the fact that Bain intervened, but clearly it has. So let me -- I'm going to go through what I think he might be required to say, in addition to what he said. I'm just going to give you my thoughts about it, Mr. Jones, and you can either do it or not. And if you don't do it or can't do it, it's because you have Rule 11 that you need to be concerned about. And if you do it, it's at your peril. But I think you've got to take a stand on some of these things.

Preliminarily, let me say that Mr. Jones filed an overlength brief. I didn't sign the order authorizing the overlength brief. It was 26 pages. If I take off the cover sheet and the signature page, I figured it was close enough. However, that supplemental memorandum that you filed, Mr. Jones, to which they objected and asked me to strike, I agreed. It's stricken. I didn't look at it. I didn't read it. It's not a permissible pleading under our rules.

With regard to the defendant's urging that I look at all this other stuff outside of the complaint,

same. I didn't do it. It's a 12(b)(6) motion. And I'm not going to take judicial notice of everything filed in the case. It needs to be more organized than that. On a 12(b)(6) motion, I'm looking at the complaint. I'm looking at what's attached to the complaint. And I am testing the sufficiency of the complaint. And I am testing it under Iqbal and Twombly.

So as I read those cases, you start with Rule 8, which requires -- Federal Rule of Civil Procedure 8, which requires a sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. That's what I'm supposed to apply. And I think Mr. Roesch stated it in his pleadings. It's all stated correctly. A claim has facial plausibility when the pleaded factual content allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Two working principles under Bell Atlantic v. Twombly. First, a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements supported by mere conclusory statements; second, determining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its

experience and common sense.

I said last Friday, in connection with another case where I applied this standard, that I see no reason to get too far afield of the standard definition of the word "plausible." And I went to Webster's dictionary, and the definition for "plausible" in Webster's is, meaning -- it means that it is "appearing worthy of belief." That's where you start. And then Webster's gives some synonyms, which include: credible, likely, believable, probable and presumptive.

So with this standard in mind, I turned to the substance of these motions. Which I think, although they appear to raise simple issues, have far-reaching ramifications. Because as I said when we started, we have this tension between the nonjudicial foreclosure process, which we want to work efficiently and we don't want it to become a judicial foreclosure process only, on the one hand, and on the other, we have to preserve the borrower's rights to bring a legitimate challenge to a foreclosure.

I'd like to repeat what I said in my Reinke opinion, 09-1541. My memorandum decision is at Docket No. 197, and I'm quoting from page 27. "This court does not hold that substantial documentation or

testimony as to the possession of the note is required in cases likes this. However, when the borrower has a specific factual basis for challenging the standing of the foreclosing entity, the burden shifts to that entity to produce sufficient competent oral or written evidence to persuade the Court that it is more probable than not that the entity instigating the foreclosure was the holder the note or an authorized agent of the holder at the time the foreclosure was commenced."

I stated that after a trial as the burden of proof. Although it sounds a lot like plausibility, too. In other words, you've got to give me some specific facts that convince me that it's plausible that, here in this case, that US Bank was not the holder of the note at the relevant times under the complaint. So whether the allegations are plausible is something that I looked at in connection with each of the causes of action.

And I think the plaintiff has pleaded some specific facts that call into question the authority of the foreclosing entity and make it plausible to me -- use synonyms: probable, believable, credible -- that US Bank may not have been an authorized foreclosing entity.

The complaint alleges that the notice of

default, which is attached to the complaint as Exhibit E, states that the beneficiary is US Bank and the notice is signed by Northwest Trustee Service as the duly authorized agent of US Bank. Here's a place where I think an allegation is missing. I think that if the plaintiff doesn't think Northwest Trustee Service had a valid agency relationship with US Bank at that time, then the complaint should so allege.

Now, Mr. Roesch characterizes that kind of allegation as conclusory. But I don't think I see it as conclusory. I think it is a fact. The question is US Bank either does -- or Northwest Trustee Service either is or is not acting as the agent for US Bank at the time this notice of default was issued. That's factual. That's not conclusory. But I think plaintiff has to take a stand on that. Because otherwise, there's nothing wrong with that notice of default. It states US Bank is the beneficiary, and it is signed by US Bank by its authorized agent.

Paragraph 3.12 alleges that attached to the notice of default was a foreclosure loss mitigation declaration signed by John Kinerty identified as the vice president of loan documentation for ASC. Yet, the notice of default describes ASC as the servicer and not the beneficiary. RCW 61.24-031(b) requires the

beneficiary or an authorized agent to make initial contact with the borrower by letter and by phone prior to issuing the notice of default.

So again, I think that if you go further, paragraph 3.13 then talks about the notice of default, that attached to the notice of default was this beneficiary declaration now required by Washington State law, which is supposed to provide the foreclosing trustee with evidence as to who the holder of the note is.

The complaint alleges that the beneficiary declaration shows that it is not signed by an officer of US Bank, but is instead signed once again by Mr. Kinerty, but this time he signs as the vice president of Wells Fargo Bank NA, and stated there to be the attorney in fact for US Bank. There's no statement within the body of that declaration that Wells Fargo has authority as agent/attorney in fact for US Bank.

I went on to Google just to sort of figure out what's the difference between an attorney in fact and an agent? Why do the lenders use these terms, which are not used in normal legal ways? Google, some of the sources I set -- maybe it's right; I don't have to flush that out -- says that an attorney in fact can

be an agency that provides only for acting as an agent in financial matters, I suppose versus other matters. I don't know.

But to me, I think there's enough there. These documents, they don't make any sense. There isn't a single document that's actually signed by US Bank, vice president US Bank. Not a single document. Everything relies on an agency relationship. So I think that raises issues for me that get me over the plausibility hurdle.

There's also a reference in paragraph 3.8 that the appointment of successor trustee is signed by a vice president of Wells Fargo Bank who was acting, again, as attorney in fact for US Bank. So I think here plaintiff has to take a stand. If plaintiff -- plaintiff needs to say that Wells Fargo Bank was not acting as attorney in fact and was not an agent for US Bank at any time relevant or at the specific times alleged.

Mr. Jones, you can go through and see what you want to say. But if you want to challenge what's been said here, you have to make the allegation that in fact there was no agency arrangement. Otherwise, you throw agency out entirely. And both I said and Bain said, agents work. If agents do things for lenders, it

works. So there's an allegation that I think is missing. If there was no agency agreement, then Wells Fargo did not have authority to sign that document for and on behalf of US Bank, and Northwest Trustee Service is not a valid successor trustee.

In 2009, paragraph 3.5 of the complaint alleges that Jeff Stenman, vice president and secretary of Northwest Trustee Service -- I know that. He testified. Igbal, Twombly says, I'm to use my knowledge and experience. There it is. He signs the assignment of deed of trust as a vice president of MERS. I heard the testimony at the trial in Reinke, and the testimony was that there were these arrangements between Northwest Trustee Service and MERS where they could sign.

So I think, however, Mr. Jones has alleged that Mr. Stenman did not have authority to sign that. If not, you need to do that. You can't just say, Mr. Stenman was known to be an employee of Northwest Trustee Service at the time. Let me just go look, because you said, "Said assignment of trust was prepared by Northwest Trustee Service without the express and property authority from the holder and of owner the subject promissory note." Well, that's part of it. But I think you also have to say, Mr. Stenman

was not an authorized agent for MERS, if you want to avoid the problem that Ms. Buck points out, which was they have an agreement that he can act in a certain capacity for MERS.

Now, in Bain, the Court called into question whether MERS can transfer any interest under a document like this, even if the document is properly executed, if it is not the beneficiary as contemplated by Washington state law. That's on paragraph 13. However, I can't tell from the language the Court used whether it's just recognizing what I recognize in Reinke, and that is that that assignment of deed of trust has no effect on the transfer of the note.

The language in Bain is not very precise. And I can't tell from that whether the Court really thinks that MERS' signing that particular document doesn't work to transfer its beneficial interest as nominee, or whether it doesn't work to transfer the note. I don't know. I stand by what I said in Reinke. Merely signing that kind of document does not do anything for the note. It doesn't transfer the note. And I stand by my conclusion that it's not the deed of trust that drives the process. It's the note.

I think those allegations that I just mentioned, together with the ones that I think are

missing, should they be added, I think they're enough to pass muster under Igbal and Twombly on a 12(b)(6) motion. I said earlier, I'll say it again, I really want to keep 12(b)(6) and Rule 56 separate. Lately I'm seeing these motions that say, motion under 12(b)(6) and 56. And once I start looking at that side of the complaint, I consider it a summary judgment motion.

So I'm not going to look at all the things that are filed in the main case. And I would invite you, Mr. Roesch and Ms. Buck, if you want me to do that, then file a motion for summary judgment and take me through it and argue that they're judicially estopped to say what they're saying in the complaint. That's how I would approach it.

Looking at the specific causes of action, I think there are some problems. But, oh, I'm so tired of dealing with the wrongful foreclosure, common law cause of action argument. And I know that Mr. Jones is presenting -- he calls it wrongful foreclosure, violation of RCW 61.24. And he's going to do that because he's preserving what he wants to preserve on appeal.

And I know, Mr. Roesch, that you're just going to keep citing all of these cases that say, there's no common law cause of action for wrongful

foreclosure. And so I will merely say, I dealt with that at length in Reinke, and I don't intend to deal with it again. I have concluded that there is a cause of action when RCW 61.24 is violated.

And I think Bain says the same thing. If you don't comply with the terms of the statute, you violated it. And I don't think there's anything wrong with that cause of action. I will say that it depends, however, upon US Bank not being the holder of the promissory note. But once Mr. Jones crosses that pleading hurdle, I don't see any basis upon which I would dismiss that particular cause of action.

The CPA claim we talked about in oral argument. I think Bain has given the plaintiff some meat. Bain says that the use of MERS, although not per se deceptive -- not per se deceptive. The Court goes on to say that if MERS claims to be a beneficiary when it is not, the deception element of the CPA is met. And in this case, the assignment of deed of trust attached to the complaint, MERS represents that it's the beneficiary. It's exactly that which Bain was talking about. I didn't have that in Reinke. That wasn't the basis for the CPA claim there.

The Court in Bain also goes on to indicate that the public impact element is presumptively met in

a case like this because there is considerable evidence that MERS is involved with an enormous number of mortgages in the country and in our state.

So that leaves the defendants to plead injury. And damages and injury are a real issue for me now, Mr. Jones. Because as you saw in my Reinke opinion, we went through that whole process, and then I found no damages. We're at the pleading stage here. And I think in this complaint you've done enough to allege damages. It says, "distraction, loss of time, loss of business opportunities, other expenses due to the defendant's wrongful conduct." So I think the allegations are sufficient.

So I think the CPA allegation, as long as the new things are added to the complaint, which I have suggested, I think the CPA cause of action passes 12(b)(6) muster.

The Fair Debt Collection Practices Act, I did not go beyond defendant's argument that it fails if US Bank is the holder. So it doesn't fail if US Bank -- if the allegations are that US Bank was not the holder. So I haven't -- that one I don't see any basis to dismiss that, assuming the complaint is amended.

I guess the defamation of title, quiet title, the problem that I have with this one, Mr. Jones, is

that I don't know what you mean. First of all, you haven't asserted a pending sale. That's absolutely critical. That is one of the elements. So when you do your amendment, if you don't include that, then I agree. It has to be dismissed. And in the past, I have dismissed this particular cause of action.

Let's see, RICO. I'm not seeing anything in the complaint that goes far enough to allege specific acts, which include anticipatory or completed offenses committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred, that would be chargeable or indictable and punishable as a felony or by imprisonment for more than one year."

So there is a list of crimes that is in 9(a) 82.010, none of which are alleged in the complaint. So you're going to amend the complaint, Mr. Jones. But if you're not going to allege those crimes in here, then I think this claim ought to be dismissed.

RESPA I think needs to be more specific. RESPA requires a statement of damages that arise from the violation of RESPA. So the damages that have to do with the unlawful conduct of, you know, US Bank and others in connection with the foreclosure doesn't count. I think, Mr. Jones, you have to have a separate

allegation that alleges damages that resulted from the violation of RESPA, which under your complaint, has to do with your allegation that your client sent a qualified request and they didn't respond.

So I don't think you have a specific allegation in that cause of action as to how your clients have been damaged as a result of the violation of RESPA, which is alleged. So you need to shore that up as well.

I don't understand the quiet title one, and so therefore I don't think it's plausible. I think you've got to state what you're trying to do there. Are you arguing that the deed of trust is completely void, and therefore, your clients want title quieted in their name solely? Or like in the Bain case, the Court said in Bain, hey, the plaintiff here isn't saying -- Bain isn't saying, she's not going to pay the mortgage. She is. She's not trying to bounce the whole mortgage. She's just saying, I don't understand who to pay, and I think the foreclosure was wrong.

So I think you've got to state in that cause of action, what is it your clients really want. Or is this a recast of the argument that the note and the deed of trust have been irreparably split and, therefore, the deed of trust is invalid. I think you

need to say it in here because otherwise it doesn't tell the defendants the claim that's being made against them.

I would like to state what I think the standard for amendment of complaints is because I think it's pretty liberal. The case I use is Cafasso v. General Dynamics, 637 F3d 1047. It's a 2011 9th Circuit case which says normally when a viable case may be pled, a district court should freely grant leave to amend. However, liberality in granting leave to amend is subject to several limitations. These limitations include undue prejudice to the opposing party, bad faith by the movant, futility and undue delay.

Further, the district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint. In this case the complaint has not been amended before. There is a very important state court case that came down in the interim which bears on these issues. I don't find that the defendants would be in any way prejudiced by allowing an amendment to the complaint, nor do I find any bad faith on the part of the plaintiffs.

So all that remains for me to do, Mr. Jones, is to ask you to give me a reasonable deadline by which

time you would file an amended complaint.

MR. JONES: 30 days, Your Honor.

THE COURT: 30 days it is. Let's give it a number. If today is the 28th, Phyllis's day of retirement, let's make it be the 26th of October.

MS. BUCK: Your Honor --

THE COURT: Oh, let me address that.

MS. BUCK: I was just going to say, we also represent MERS. Can we preserve that we can wait to respond or otherwise answer the complaint until that date has passed?

THE COURT: Has MERS not responded to the initial complaint?

MR. ROESCH: That's right. I believe there were service issues.

THE COURT: Oh, any problem with that, Mr. Jones? Let's just have MERS respond to the new complaint.

MR. JONES: That's fine.

THE COURT: So MERS respond to new complaint only. And I do want to say about Northwest Trustee Service, Ms. Buck, that I did not look at any of the issues you talked about today. Because your motion relied completely on US Bank is either the holder or not. And that's how I looked at it. So you know, when

he amends the complaint, if you want to move on those issues, then I'll look at them.

But honestly I didn't look at any of the things that you talked about today enough to -- and certainly, since Mr. Jones didn't have notice of what you were arguing, I'm not going to pin that on him either.

So I would like to have an order. I guess, Mr. Jones, you can give me an order, and it can be simple. The motion to dismiss is denied. Plaintiff shall file an amended complaint on or before October 26th, 2012.

MR. JONES: It will be done, Your Honor.

THE COURT: Okay. And with that, we are at recess.

MR. JONES: Thank you, Your Honor.

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CERTIFICATE

ROBYN OLESON FIEDLER certifies that:

The foregoing pages represent a complete transcript of the digitally-recorded proceedings.

These pages constitute the original or a copy of the original transcript of the proceedings to the best of my ability.

Signed and dated this 25th day of October, 2012.

by |s| Robyn Oleson Fiedler
ROBYN OLESON FIEDLER,
Certified Court Reporter.